



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
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Lieutenant Governor

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LAURIE BURT  
Commissioner

September 12, 2008

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In the Matter of  
Associated Processor Service

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Docket No. 2008-103  
DEP File No. UAO-BO-08-2001  
Natick

**RECOMMENDED FINAL DECISION**

On June 10, 2008, the Office of Appeals and Dispute Resolution (“OADR”) received a letter from Associated Processor Service (the “Petitioner”) requesting an adjudicatory hearing regarding a Unilateral Administrative Order, which Petitioner identified by its Department of Environmental Protection (“MassDEP” or “Department”) file number UAO-BO-08-2001. However, Petitioner failed to include a copy of the appealed document as required by 310 CMR 1.01(6)(b). On July 22, 2008, OADR issued an Order for a More Definite Statement requiring Petitioner to file a copy of the appealed document by August 1, 2008. Petitioner failed to do so. On August 7, 2008, OADR issued a second order, an Order for a More Definite Statement and to Show Cause why the appeal should not be dismissed. In the August 7, 2008 Order, Petitioner was directed to explain the legal and factual grounds for error on the part of the Department in



the Department's unilateral enforcement order. Also, Petitioner was directed to attend a pre-screening conference on September 4, 2008, for which Petitioner was required to prepare by holding settlement discussions with the Department and preparing a short 2-page pre-screening memorandum explaining his issues, what he expected to prove at hearing and what relief he sought. Petitioner did not comply with this Order, but, instead, Petitioner's officer, Mr. Small, telephoned the Assistant Case Administrator on September 2, 2008, and requested that his appeal be withdrawn.

Under 310 CMR 1.01(10), which is applicable to this adjudicatory proceeding, a Presiding Officer is authorized to impose sanctions upon parties which have conducted themselves in the same manner as have Petitioners. Specifically:

(10) Sanctions. When a party fails to file documents as required, respond to notices, correspondence or motions, comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; demonstrates an intention not to proceed; demonstrates an intention to delay the proceeding or resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01; the Presiding Officer may impose appropriate sanctions on that party. Sanctions include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);
- (d) striking pleadings in whole or in part;
- (e) dismissing the adjudicatory appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and
- (g) issuing a final decision against the party being sanctioned.

In this case, the Petitioners have:

- (1) failed to file their claim documents to state complete and clear claims;
- (2) failed to answer the July 22, 2008 Order for a More Definite Statement giving them a chance to file a complete claim;
- (3) failed to respond to the August 7, 2008 Order by:

- (a) failing to initiate settlement discussions as ordered;
- (b) failing to file a Pre-Screening Memorandum; and
- (c) failing to attend the Pre-Screening Conference;

Petitioner also has indicated orally that the Petitioner wishes to withdraw his appeal. Petitioner committed to OADR to send in a written confirmation of this withdrawal on September 3, 2008. It is now seven days later, and Petitioner has still failed to submit written confirmation of withdrawal.

Even had the Petitioner not indicated that it wished to withdraw the appeal, there are more than ample grounds for dismissal. Dismissal for failure to prosecute, particularly where there have been multiple failures to respond to orders is warranted. In addition, the failure to attend and participate in the pre-screening conference is particular fatal to any prospect for informal or formal resolution of an adjudicatory proceeding because of the central role played by that conference. *See, Matter of Robert W. McKenney*, DALA Docket No. DEP-06-549, DEP Docket No. 2006-042, Final Decision – Order of Dismissal, 2007 DALA LEXIS 18 (January 23, 2007); *Matter of Cretarolo*, DEP Docket No. WET-2007-002 Recommended Final Decision (January 18, 2008), adopted by Final Decision (January 23, 2008).

Therefore, for all the reasons set forth herein, I recommend that this matter be dismissed for lack of prosecution and mootness, due to voluntary withdrawal.

### **NOTICE**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

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Laurel A. Mackay  
Presiding Officer

## **SERVICE LIST**

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